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IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, et al.,

Appellants,

v.

JOHN C. PITTENGER, et al.,

Appellees,

and

JOSE DIAZ, et al.,

Intervening Parties Appellees.

On Appeal From the United States District Court for the
Eastern District of Pennsylvania.

**PETITION OF APPELLEES JOSE DIAZ, ET AL.
FOR REHEARING.**

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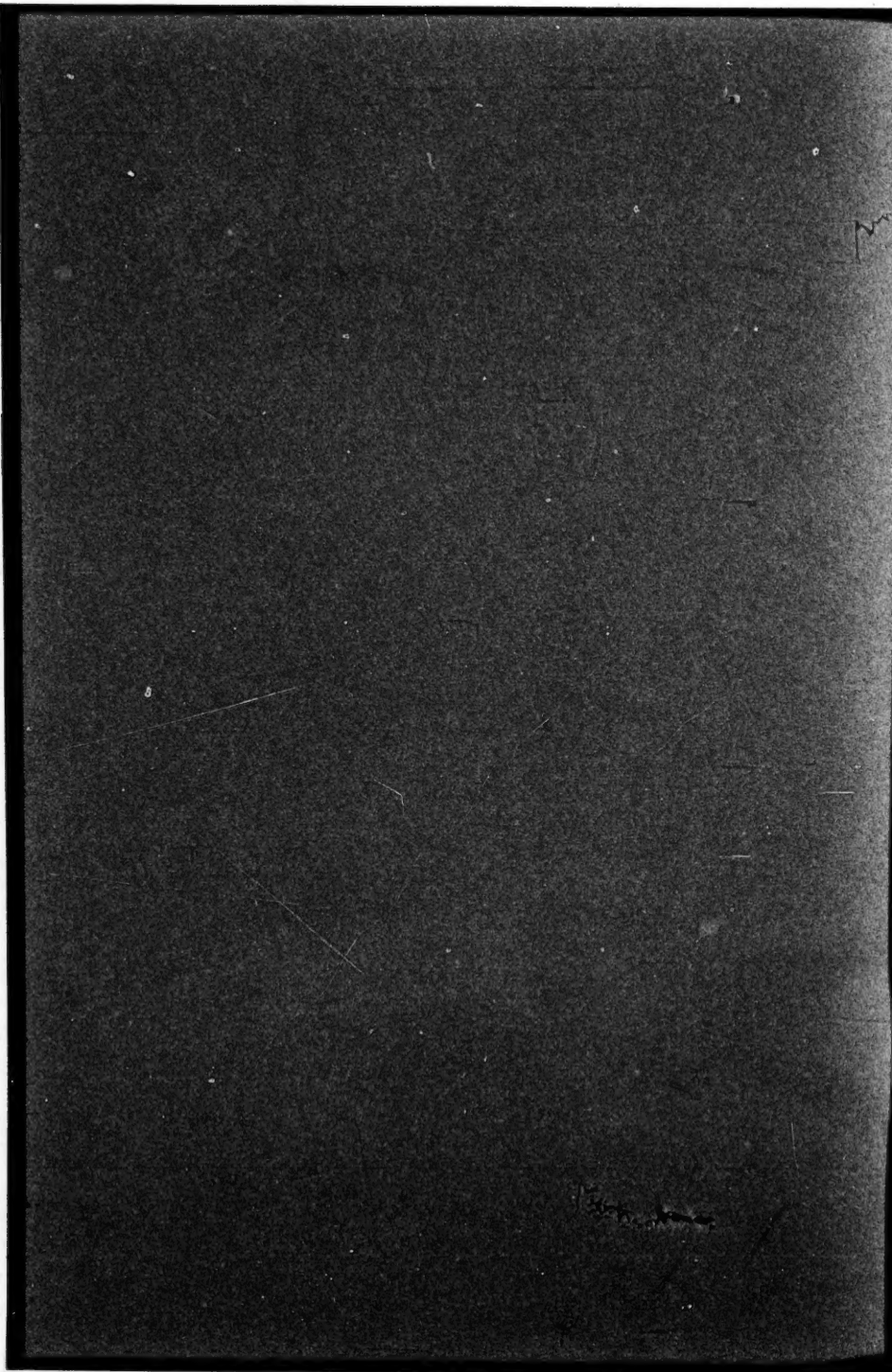


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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**PETITION OF APPELLEES JOSE DIAZ, ET AL.
FOR REHEARING.**

Pursuant to Rule 58 of this Court, Appellees herein petition this Honorable Court for rehearing on the following questions:

I. Whether, when the trial court has made express findings of fact on critical issues, based upon an unchallenged record of sworn testimony, a court of review is entitled to rule upon the basis of assumptions of fact not discoverable in that record and which are in fact squarely contradicted by that record.

II. Whether the views of the Court on "political divisiveness related to religious belief and practice" are intended to be a rule of constitutional law, applicable to all religiously motivated people who assert rights of speech and petition, or are intended to be applicable solely to advocates of public aid to education in religiously affiliated schools.

Counsel for Intervenor Appellees have the duty, not only on behalf of the parents whom they represent, but indeed as officers of this Court, to urge that full briefing and argument be ordered on these two questions. Thereafter a determination would be called for as to whether the Establishment Clause issue, and the issue of denial of Equal Protection to Intervenor Appellees (upon which the Court failed to rule), should not be reargued.

The first of the questions raised in this Petition has implications which bleed into the whole fabric of the judicial process. If a sound and substantial trial record can be largely ignored in this case, equally good trial records can be ignored in other cases. If members of the bar come to the understanding that the heavy labor involved in *doing the honest thing of responsibly trying a case* is all an exercise in futility, the public will perforce abandon what confidence it yet retains in a system which, at least in this Court, has always paid heed to the importance of *evidence* and thus preserved itself from any credible charge of decision by personal fiat.

The second question here raised pertains to an issue upon which the Appellants, who raised it in their Complaint (A8), failed to offer evidence upon trial, but upon which Appellees did offer evidence. It was an issue upon which the court below expressly ruled (J. S. 50a) favorably to Appellees. Here again, as we show in this Petition, is a pronouncement of the Court which has ramifications going

far beyond this case. Because this pronouncement can be taken to be a direct attack upon the exercise of First Amendment rights by religious groups, it is imperative that it be brought out in the open—in all of its ramifications—and fully argued before this Court.

As to both of these questions, we, as counsel, are moved to say out of a profound *respect* for the Supreme Court of the United States, and out of love for the judicial process ordained by our Constitution, that six Justices have disposed of this case in a way which obliterates rights of litigants but which, in doing so, does harm to the Court and to the process.

I. The Court May Not Rule on the Basis of Assumptions Which Are Flatly Contradicted by the Trial Court's Express Findings of Constitutionally Significant Facts.

The opinion of the Court, in voiding legislation herein, does violence to the settled general rule that findings of fact by the trial court, if they have proper evidentiary support, are conclusive and binding upon the appellate tribunal. *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428 (1892); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). And see Rule 52(a), Federal Rules of Civil Procedure:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

No question has been raised here, either by Appellants or by this Court, as to whether the trial court's findings of fact have adequate evidentiary support. *Cf.*, *Time Incorporated v. Pape*, 401 U. S. 479, 484 (1971). And, especially in relation to the supposed issue of “political divi-

siveness related to religious belief and practice", this Court ought to have held fast to its own precept, namely,

" . . . the salutary principle that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances." *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U. S. 605, 621, fn. 20 (1974).

We believe it to have been an egregious and shocking error on the part of six Justices to have ruled *directly contrary to the evidence* in this case. It cannot be denied that the evidence, supplied by the witnesses, Dr. Boesenhofer (A51-A64), Ms. Stopper (A64-A70), Mr. Horowitz (A70-A87), Sister Donovan (A87-A93), Mrs. Bense (A93-A97), Mr. Powell (A97-A105), Mr. Jarvis (A105-A116) and Mr. Brutto (A116-A122) went to issues which this Court has deemed critical. Can it be said that all that pertains to "entanglement" and "primary effect" are *not* critical issues? And is not all of the foregoing testimony—seventy one pages of it in the Appendix—directly in point on those issues?

Yet six Justices, in their opinions herein, have chosen to ignore that testimony as though it had never been given.

One must therefore respectfully inquire: do the Justices regard that testimony as perjured? Certainly that cannot be ventured. Do they regard those witnesses—whether professionals or parents—as having neither the background nor the brains to have testified credibly? The record makes impossible any such conclusion.

The six Justices were not content, however, to ignore that testimony: *they repeated assumptions precisely upon points with which the record directly deals, for example:*

(a) "*Inculcation*" of religion by state employes rendering auxiliary services.

The Court does not cite *one instance* of the inculcating of religion by the 2,400 auxiliary service teachers under the Act 194 program during the *three years* of its operation, in 67 counties of Pennsylvania, serving 400,000 children per year in 1,320 schools. It is astounding that, with myriad contacts and situations in which thousands of these public employes were involved, over a three year period, with one million two hundred thousand children, the Court did not point to *even one* actual incident wherein any inculcating (or "intertwining", or "inadvertent fostering") of religion took place. *It did not because it could not.*

Just as surprising is the Court's total refusal to make a plaintiff prove its case. Instead, the plaintiffs' gross and scurrilous imaginings have been left without a syllable of correction or proper admonition from the Court. And, citizens, school administrators, and professional employes of the Commonwealth have been left defamed, as incapable of public trust, incapable of observing the law, needing, therefore, "continuing surveillance".

Powerful organizations, aided by able counsel, brought this litigation. Surely, they had the means to bring evidence of their charges to the attention of the Court. These would be *fulcrum facts*, "*constitutional facts*", facts of priority importance in this litigation. But the plaintiffs produced *no facts*. It must be assumed: *they did not because they could not.*

But the defendants did have facts. They offered witnesses to court and to counsel, to be subject to the most searching cross-examination. Strangely, no attempt to question them was ventured by the plaintiffs, although these witnesses each had freshly demolished the absurd and ugly charges leveled by plaintiffs.

It is sad indeed, in light of the record, that the Court never once is able to spot and talk about one fact respecting "inculcation", but instead must resort to completely subjunctive terminology: "danger", "likely", "very likely", "potential", etc. By contrast, we offer again as an appendix to this Petition the testimony of Dr. William D. Boesenhofer.

(b) *"Potential for divisive conflict"*.

The Court says that the Acts create a "serious potential for divisive conflict over the issue of aid to religion." (Slip op. 22). Leaving aside the deeper questions of whether any aid to religion is afforded by the Acts and whether "divisive conflict" is something which Americans may no longer engage in, we ponder again the Court's insistent resort to the word, "potential".

Pennsylvania is scarcely an obscure part of the nation. The national television networks and news services all operate here. Religious conflict appears patently newsworthy, as even a casual reader of the daily press can verify. It is safe to say that, had these programs, which the Court calls "massive aid", engendered a religious fight, the media would have reported it. Or at least *someone* would know about it. If the plaintiffs knew about it, we can be sure they would have lost their reluctance to produce someone who could have described it. And what the plaintiffs did not know, the Court cannot possibly know. While that may explain the Court's resort to talk of "potential", it does not make that resort satisfactory as a substitute for constitutionally critical facts.

Those facts are to be found in the sworn deposition of Mr. Brutto (A118-A122), a distinguished newspaperman whose credentials (A116-A117) identify him as a highly seasoned observer of the political scene in Pennsylvania and at the seat of the state legislature. According to the

one piece of evidence which exists in the case, there was *no* fight, *no* "divisive conflict", *no* "continuing political strife", *no* "political fragmentation and division along religious lines". We thus come to the questions: (a) how "potential" is something which has not been proven to occur? (b) Where is any proof that (here or with respect to the acts considered in *Everson*, *Allen*, *Lemon*, *Nyquist* or *Sloan*) any such events occurred? (c) Why resort to "potential" when record facts are available?

(c) "Massive aid".

The Court states that there is "massive aid provided the church-related nonpublic schools" by Act 195 (Slip op. 14).

But the record shows that Act 195 provides for a cost of \$25 per pupil per year (A22). The record further firmly establishes that the great practical effect of the aid in question is upon children. See testimonies cited *supra* of Dr. Boesenhofer, Ms. Stopper, Mr. Horowitz and Mrs. Bense. This evidence appears not to have been weighed and considered by the Court, whose seeming preoccupation with non-proved and disproved "potentials" and "dangers" leave a half million children standing apart—as though they and their personal needs were not the subject and object of all that the legislature strove to accomplish in Acts 194 and 195.

It is a harsh affront to those children to suggest, as does the Court in Footnote 17 (Slip op. 18), that free auxiliary services may still be offered "to all students in the Commonwealth, including those who attend church-related schools." Having to be carted, at their parents' expense, to overcrowded learning centers where they will have low priority for service, is to offer these children absolutely nothing. The testimony of three highly qualified professionals utterly refutes that claim and adds the sig-

nificant fact that there are vitally needed auxiliary services which cannot be effectively rendered other than in the child's daily, normal learning environment—his own school (A56, A66-A68).

II. If the "Religious Divisiveness" Charge Is a Universal Constitutional Principle, It Endangers the Religious Liberty of Everyone. If It Applies Only to the "Parochial Education" Question, It Attacks the Liberties of a Single Group.

As matters stand, the Court is telling millions of American citizens—whom the majority by inference identifies as mostly of the Catholic faith—to stay out of the political forum and to refrain from exercising their most basic First Amendment liberties of speech, petition, press and assembly. The incredible assertion comes to this: *that even though a statute contains no constitutional infirmity whatsoever, it must nonetheless be declared unconstitutional on the extrinsic ground that, if it were upheld, some citizens would (or could, or might) decide to exercise First Amendment rights of speech, press, assembly and petition directed to the enactment of further legislation relating to the same area of concern.*

Merely to state such a proposition is to reveal its repressive character.

Such a doctrine has been unknown in the constitutional history of the United States.¹ Its sudden invoking at this

1. The chief source of this concept appears to be the often-cited article of Professor Freund, *Comment, Public Aid to Parochial Schools*. This article was originally delivered as a panel piece at an ABA summer meeting, then appeared in 82 Harv. Law Rev. 1680 (1969) and was finally given wide circulation in, a highly defamatory context, 74 *Case & Comment* No. 6 (1969). The article cites to scant authority and is nothing other than a manifesto propagandizing the *personal views* of its author. Surprisingly, Freund is cited by the Court as though he were an actual source of evidence (Slip op. 16), whereas there is nothing to indicate that he has had any personal familiarity whatever with schools about which he wrote.

time throws into bold contrast three centuries of American history during which majority religious groups in this country preached, practiced and promoted "religious division along political lines" to the hilt.² Its invoking at this time, in the singular instance of what the Court calls the "parochial education" question throws into bold contrast the universal, varied and intensive *religious witness* (by no means confined to Catholics) in the United States today. If, as the Court says, *religious division along political lines* is the evil to be avoided, then campaigns *by religious groups* for or against the Prayer Amendment, legislation aimed at winning in or withdrawing from Vietnam, or relating to gambling, humane slaughter, welfare rights, drug abuse, governmental aid to Israel, Prohibition, trade with South Africa, Sunday Laws, conscientious objection, obscenity, "right to work" laws, etc.—all of which have created or are creating religious division along political lines, must—if they succeed—result in unconstitutional legislation.

The "divisiveness" doctrine is either an *ad hoc* device specially employed to help bury the "parochial aid" issue, or it is not. If it is the former, then it all too readily lends itself to the uses of those who delight to play upon sordid Nineteenth Century images of "the Catholic Power". But if it is not an *ad hoc* device—if the majority are interdicting, as *constitutional principle (therefore universal of application)*, "religious division along political lines"—then reargument is badly needed in this case in order that the implications of such doctrine can be fully explored.

2. See, generally, I A. Stokes, Church and State in the United States, 408-426, 833 (1950); II A. Stokes, Church and State in the United States, 3-61, 157-196, 275-285, 297-308 (1950); K. MacKenzie, The Robe and the Sword—The Methodist Church and the Rise of American Imperialism (1961); A. Sinclair, Era of Excess—A Social History of the Prohibition Movement (1962); M. and H. Josephson, Al Smith: Hero of the Cities, 350-400 (1969); P. Barrett, Religious Liberty and the American Presidency (1963).

As matters stand, the Court appears to take one or both of the following positions:

- X seeks the passage of certain legislation.
- Y, who does not like the legislation, decides to turn the matter into a religious controversy.
- Therefore, when the legislation is enacted, the courts must strike it down as unconstitutional.

Another possible reading of the Court's position is as follows:

- Jewish groups lobby³ for passage of the federal Resettlement Act (P. L. 92-352, July 13, 1972, P. L. 95-571, Oct. 26, 1972), which "singles out a class" (Jewish refugees) for a "special economic benefit" of \$135 million of public funds.
- If the aid were to be upheld by the courts, it could be used as "the platform for yet further steps" in the form of "demands for increased and expanded aid"
- Therefore, the Resettlement Act is unconstitutional.

The foregoing only slightly suggests the kinds of problems to which the "divisiveness" charge gives rise. If it is a principle of general application, it treads on the rights of all religious groups and persons. Is it intended instead as an *ad hoc* device for purposes of the "Catholic school question"?

In the present case, in view of the fact that the Court had previously stated its assumption that "political division along religious lines" was the inevitable accompaniment of legislative efforts to aid children in religious schools, it became important for all parties to establish

3. See *The New York Times*, April 6, 1973, p. 14.

whether or not, *in fact*, any such "division" had arisen in Pennsylvania with respect to Acts 194 and 195. A prominent and seasoned observer of the Pennsylvania political scene was therefore deposed by Appellees in order to test the assumption. This sworn witness stated facts which showed the assumption to be false. The Appellants, who all along had clamored that the assumption was correct, declined to produce *any* evidence of *any* situation present or past, to substantiate their claim. The Court below correctly held that the charge "simply has not been proven." (J. S. 50a).

Therefore, on the record, the charge is shown baseless. But the deeper question, which now *demand*s review, relates to the freezing effect of the "political division" concept upon the liberties of speech, press, petition and assembly of religious adherents. We respectfully request the opportunity to brief and argue that "doctrine" in terms of its origins in history, in terms of the one group to which it has now been applied, and in terms of its ramifications with respect to the constitutional liberties of all other groups.

CONCLUSION.

For all of the foregoing reasons, it is respectfully requested that this Court grant this Petition.

Respectfully submitted,

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Certificate of Counsel.

As counsel for the Petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

WILLIAM BENTLEY BALL,
Counsel for Petitioners.

Dated: June 13, 1975

APPENDIX A.

WILLIAM DAVID BOESENHOFER, sworn.

DIRECT EXAMINATION.

By Mr. Ball:

Q. Dr. Boesenhofer, what is your residence?

A. I live at 530 Evergreen Street in Emmaus, Pennsylvania.

Q. And would you tell the court, please, what your occupation is?

A. I am a psychologist employed by Allentown State Hospital and also by Colonial-Northampton Intermediate Unit No. 20.

Q. Will you kindly tell the court what your educational background consists of in chief?

A. I have a Bachelor of Arts Degree in Psychology from Upsala College in East Orange, New Jersey; Master in Education and Doctorate in Education, both areas, in counseling and psychology from Lehigh University in Bethlehem.

Q. Do you possess any State licenses or certificates or other State qualifications?

Mr. Thorn: If the court please, we will concede his qualifications as a psychologist.

Judge Gibbons: We are not familiar with them.

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I would like to hear them so we know what area he is going to testify in.

Mr. Thorn: I didn't mean to preclude the court.

Judge Bechtel: We would like to know.

By Mr. Ball:

Q. Dr. Boesenhofer, do you possess any State licenses, certificates or other qualifications?

A. Through the Department of Education I am certified as a secondary counselor and also as a public school psychologist, and at the present time I am eligible for a State licensure in psychology. This is a new program in the process of being developed in the State.

Q. Are you a member of any professional organizations in your field?

A. I belong to the Lehigh Valley Psychological Association and also the American Psychological Association.

Q. Now, what have been your past employments?

A. From '64 through '69 I taught in the public schools. From '64 through '66 I taught special education in Berks County in Tulpehocken School District. This would have been with educable and trainable retarded children. And from '66 through '69 I taught again educable retarded children in the secondary level in Salisbury Township in Lehigh County.

Q. That brings us down to where you are presently employed?

A. Not quite. After I taught for five years, I had an academic

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residency, one year at Lehigh. During that period I had an internship at Allentown State Hospital, and in May of '69 I was a staff psychologist at the Neuropsychiatric Clinic for Allentown General Hospital, and since October of '70 I was been employed full time at Allentown State Hospital and with the Intermediate Unit I have been doing consultant work there. In February or March of '72, I started there.

Q. How long have you been employed by Intermediate Unit No. 20, Dr. Boesenhofer?

A. It was either February or March of '72 that I first began there, but it has only been since February of '73 that I have been working with non-public schools.

Q. All right. Now, what does your employment for Intermediate Unit No. 20 consist of?

A. My work there is primarily in counseling and consultation. Specifically, when a student is referred for an evaluation, I will interview the student, generally administer some tests, I will write up a report, make certain recommendations for the child, I will have conferences with parents, administrators, counselors, teachers, things of this sort.

Q. How important is that evaluation work you speak of?

Mr. Thorn: Objection. If the court please, I would like to ask for an offer of proof. We may be able to concede whatever he is going to testify to.

Judge Gibbons: Mr. Ball?

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Mr. Ball: Yes, if it please the court, presently we have been establishing the professional and expert qualifications of Dr. Boesenhofer. We would then be moving directly with our questions into areas which very strongly bear upon issues of the primary effects of entanglement which are issues in this case, and in order to do that, we need to know the nature of the work that he is performing and under what circumstances it is being performed within, as we will bring out in a moment, the non-public schools.

Judge Gibbons: Mr. Thorn, to what would you be willing to stipulate in that respect?

Mr. Thorn: Well, I can't make a stipulation on entanglement, obviously, so I guess we will have to hear the testimony.

Mr. Pfeffer: We may stipulate to all the facts, not the conclusions, if Mr. Ball will state what factual witnesses he will call.

Judge Gibbons: It might be quicker to hear the witness than wait for the stipulation. Let's proceed.

By Mr. Ball:

Q. My question, then, Dr. Boesenhofer, was with respect to the importance or the role of the evaluation work you spoke of.

A. The evaluation is basically the beginning of working with the child. I think as such it kind of opens the door to correction, to remedial work with that child.

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Q. Now, do you perform these services in non-public schools which are religiously affiliated?

A. Yes, I do.

Q. In your work with children of this kind, do you find that there are many such children?

A. Yes, I have.

Q. Can you characterize, can you tell us some of the characteristics of these children which call for your remedial services?

A. Most of the kids that I work with tend to be of average intelligence or above. That is, they are not mentally retarded, but for some reasons these kids are failing in school. Some of them tend to be very withdrawn in the classroom. Some of them may be very hyperactive, some of them very disruptive, various kinds of emotional or social problems which I think negatively affect their learning, and it is these things that I look at specifically.

Q. Are these kinds of children found in all schools, that is, public and non-public?

A. Yes, they are.

Q. Now, coming to the technique of your psychological evaluations, just a question or more on the nature of your work: What do your psychological evaluations actually consist of? What do you do?

A. With the child?

Q. Yes, and with others if there are others?

A. As I stated, with the child, first of all, I conduct a [24]

rather intensive interview. After that, I will administer certain tests such as an intelligence test, an achievement test, certain personality inventories. I will write up the report, make recommendations, meet with the teacher, suggest things that the teacher might do to work with the child. If necessary, I may refer to a community agency such as mental health, mental retardation, things that the guidance counselors in the school might do to work with the child, things of this type.

Q. Of what value are the psychological services which you render? Of what value are they to children in your professional opinion?

A. As I say, I think they are the door, they open the way to correction. I think it is very important to get at these kids who have difficulties early to hopefully get at some kind of correction, psychotherapy, counseling, possibly placement in some sort of special classroom environment.

Q. Were these psychological counseling services available in the non-public schools which you served prior to the enactment of Act 194?

A. It is kind of difficult to answer. Yes and no. They were available but in a roundabout way.

Q. What do you mean by "in a roundabout way"?

A. A child in a non-public school could be referred for a psychological evaluation prior to this Act. The difference was the child had to be brought into a public school to be seen. I could not go into a non-public school to see the child.

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I have had cases in the past where a child in a non-public school was brought into a public school for an evaluation, but the majority of children were not referred for this kind of thing.

Q. Comparing the present system under Act 194 in which you go to the schools in order to render service with the pre-existing roundabout way that you have described, which in your professional opinion renders the better service to children?

A. I believe it is much more desirable to go into the non-public—for me—to go into the non-public school.

Q. Dr. Boesenhofer, I would like to ask you what your religious affiliation is?

A. I belong to the Lutheran Church.

Q. Is it your understanding that under Act 194 there are any legal restraints respecting religion?

A. I am not sure what you mean.

Q. Are there any restraints which you understand you must observe with respect to religious inculcation or reflecting religion in connection with your rendering the service?

A. Yes. I am not permitted to reflect any kind of religious teachings.

Q. As a public employee, do you consider yourself bound to obey the laws of the Commonwealth, State and Federal Constitutions?

A. Yes, I do.

Q. In your offering of psychological services under Act 194 in

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non-public schools, will you tell the court whether you have ever attempted to influence children in favor of the Lutheran faith?

A. I never have done this, no.

Q. Have you introduced religious ideas, materials, or subject matter in connection with your work?

A. In no way at all.

Q. In your offering of these services, do you offer any of these services in Catholic schools?

A. Yes, I do.

Q. In your offering of these services in Catholic schools, have you encountered any disputes with religious authorities in those schools over the precise meaning and extent of the legal restraints against introduction of religion into your work?

A. There have been no disputes or any kinds of problems.

Q. Have you felt any pressure to conform to Catholic or other religious views?

A. None whatsoever.

Q. Has any sort of religious atmosphere in those schools caused you in any way to start reflecting religion in your work in those schools?

A. No.

Q. Suppose you felt, Dr. Boesenhofer, professionally, now, that a child in a Catholic school or a Moravian school or some other religious school would do better in a public institution, what would recommendation be?

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Mr. Thorn: Objection.

By Mr. Ball:

Q. Would you make a recommendation?

I will rephrase the question.

Mr. Thörn: I will withdraw the objection.

Mr. Pfeffer: We withdraw the objection.

Judge Bechtle: The question is, would you make a recommendation?

The Witness: Yes, I have made this type of recommendation already and a child is now in a public school.

By Mr. Ball:

Q. You have made a recommendation, may I ask, that he be transferred? Is that your answer?

A. Yes.

Q. Suppose you felt professionally that a particular child in a religiously-affiliated school, let's take a Catholic school, as an example, should be under a male teacher rather than under a female teacher who is a nun. What would your recommendation be? Would you make a recommendation?

A. I have already made this type of recommendation also.

Q. Did you encounter resistance or objection or pressure on the part of authorities in such Catholic school to your recommendation?

A. None whatsoever. They followed through with the ideas.

Q. Now, apart from these legal restraints on introducing religion under Act 194 which we have been talking about, are there

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any other restraints which you feel against your utilizing your professional services for purposes of religion?

A. Well, as a member of the American Psychological Association, there are ethical standards for psychologists and these certainly prohibit introducing any kind of religion into one's professional practice, so ethically I certainly could not reflect any religion or bootleg any religion through my work as a psychologist. There are, of course, penalties for not adhering to these ethical standards.

Mr. Ball: Thank you, Dr. Boesenhofer.
Those are all of our questions, Your Honor.

Mr. Reath: No questions, Your Honor.

Mr. Blewitt: No questions, Your Honor.

Judge Gibbons: Any cross-examination, Mr. Thorn?

Mr. Thorn: No, no questions.

Judge Gibbons: Judge Higginbotham?

By Judge Higginbotham:

Q. How many students have you seen since you started to work under this specific program?

A. Under Act 194?

Q. Yes, sir.

A. I have only seen 11 to date.

Q. 11? And of those 11 students you have seen, what type of school were they going to?

A. What type were they going to?

[29]

Q. Yes.

A. They were in a non-public school.

Q. What type of non-public school?

A. Roman Catholic.

Q. How many times have you made a recommendation that a child be transferred from a non-public school to a public school?

A. One time.

Q. And you testified about what was available prior to the present system. I gather that you have seen children in a public school who had been referred there from a non-public school before?

A. That's correct.

Q. But you testified that apparently you didn't have that with any frequency?

A. No.

Q. Why? Was there just as much a need then?

A. The need was just as great. I could only speculate as to reasons.

Q. What is your most reasonable judgment as to why they weren't sent over to the public school?

A. Physically I think it is extremely inconvenient to have a child brought from one school building to another. They may be some distance away. Also I think from my aspect it is a lot more difficult for a child to see me for the first time, a stranger, in an unfamiliar school.

Q. Would the quality of your judgment, your professional judgment,

[30]

and your capacity to help the kid be significantly deterred simply because the child had to come to the public school to be consulted by you or for you to see him?

A. It could be a detriment in some cases. It depends upon the child and the nature of his problem.

Judge Higginbotham: Thank you.

By Judge Bechtle:

Q. When you interview a student, where does the interview take place? What is the setting of the interview? Are you alone with the student?

A. Yes, I am.

Q. Did you ever interview with anyone present?

A. No, I didn't.

Q. Like a teacher?

A. No.

Q. And the tests that are given, the written tests, where does the underlying written material come from? Do you develop that yourself or where do you get those materials?

A. No, these are standardized what they consider classified tests published by Psychological Corporation.

Q. And the recommendations that you make you reduce to written form?

A. Yes, but I also have a conference with the teacher or counselor on the student.

Q. Usually alone?

[31]

A. Yes.

Q. And who receives a copy in the usual case of your written report and recommendation?

A. It goes to the school. I assume it is kept in the counselor's office. The teacher would also see a copy of this but it would not be kept with the teacher because it is a confidential report.

Q. Right. And in addition to that filing, is there any copy filed with any official of the Commonwealth?

A. The Intermediate Unit keeps a copy of this.

Judge Bechtle: All right. That's all I have.

By Judge Gibbons:

Q. Does the parent get a copy?

A. No, they do not.

Q. In evaluating the children to whom you render service, is it significant in your evaluation for you to personally observe the school atmosphere?

A. At times, yes; generally, no.

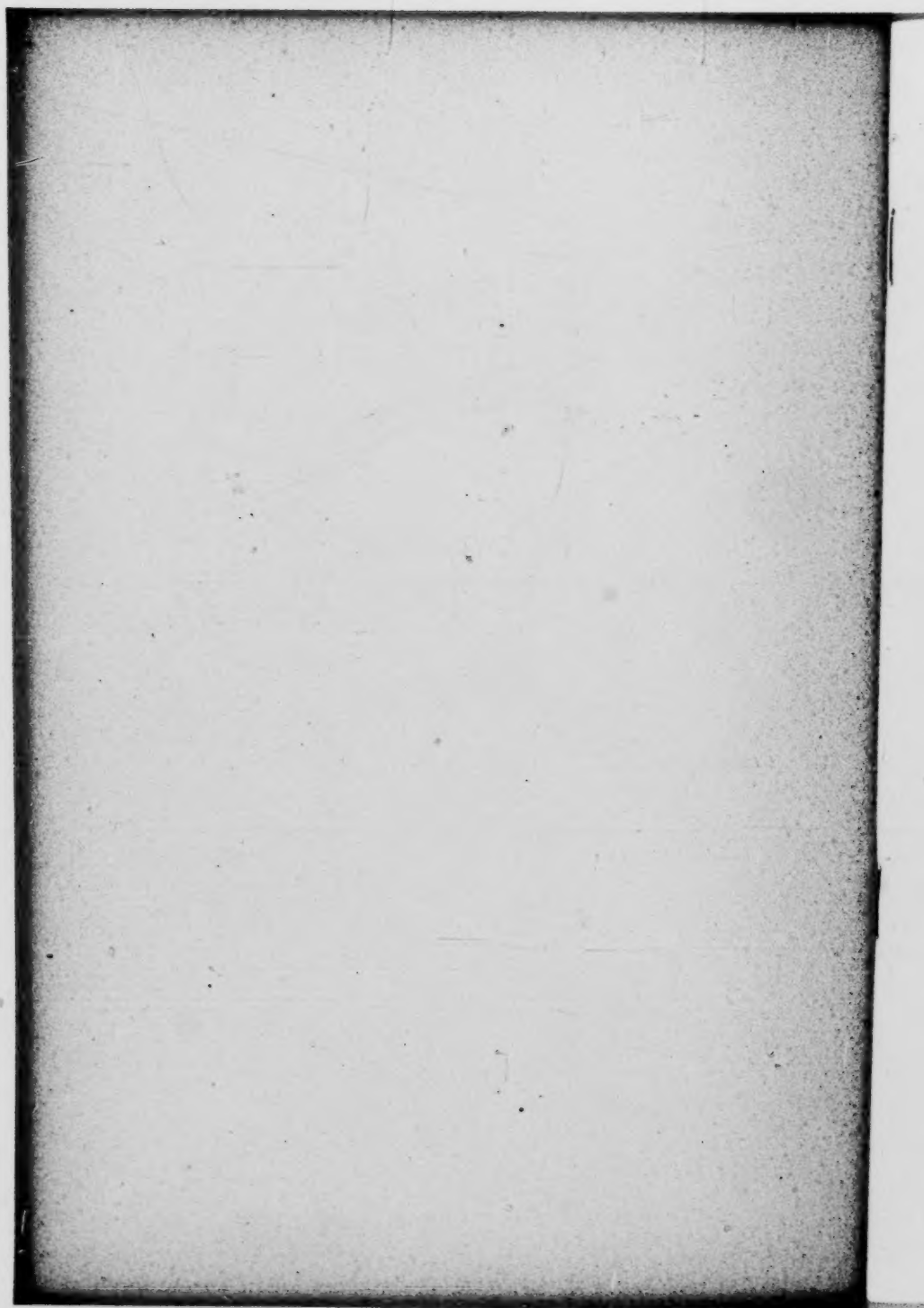
Judge Gibbons: The court has no further questions. Do counsel?

Mr. Ball: We are ready to call our next witness, Your Honor.

Judge Bechtle: You may step down. Thank you.

Judge Gibbons: Call your next witness.





(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MEEK ET AL. *v.* PITTENGER, SECRETARY OF
EDUCATION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

No. 73-1765. Argued February 19, 1975—Decided May 19, 1975

The Commonwealth of Pennsylvania is authorized to provide directly to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory attendance requirements "auxiliary services" (Act 194) and loans of textbooks "acceptable for use in" the public schools (Act 195). Act 195 also provides for loans directly to the nonpublic schools of "instructional materials and equipment, useful to the education" of nonpublic school children. The auxiliary services include counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial, or educationally disadvantaged students, "and such other secular, neutral, nonideological services as are of benefit to nonpublic school-children" and are provided for those in public schools. The instructional materials include periodicals, photographs, maps, charts, recordings, and films. The instructional equipment includes projectors, recorders, and laboratory paraphernalia. Petitioners brought this suit in the District Court challenging the constitutionality of both Acts. The court upheld the constitutionality of the textbook and instructional materials loan programs and the auxiliary services program but invalidated the instructional equipment loan program to the extent that it sanctioned the loan of equipment "which from its nature can be diverted to religious purposes." *Held*: Act 194 and all but the textbook loan provisions of Act 195 violate the Establishment Clause of the First Amendment as made applicable to the States by the Fourteenth. Pp. 9-22; ———.

374 F. Supp. 639, affirmed in part, reversed in part.

Syllabus

MR. JUSTICE STEWART delivered the opinion of the Court with respect to Parts I, II, IV, and V, finding:

1. The direct loan of instructional materials and equipment to nonpublic schools authorized by Act 195 has the unconstitutional primary effect of establishing religion because of the predominantly religious character of the schools benefiting from the Act since 75% of Pennsylvania's nonpublic schools that comply with the compulsory attendance law and thus qualify for aid under Act 195 are church related or religiously affiliated. The massive aid that nonpublic schools thus receive is neither indirect nor incidental, and even though such aid is ostensibly limited to secular instructional material and equipment the inescapable result is the direct and substantial advancement of religious activity. Pp. 12-16.

2. Act 194 also violates the Establishment Clause because the auxiliary services are provided at predominantly church-related schools. The District Court erred in holding that such services are permissible because they are only secular, neutral, and non-ideological, since excessive entanglement would be required for Pennsylvania to be assured that the public school professional staff members who provide the services do not advance the religious mission of the church-related schools in which they serve. Cf. *Lemon v. Kurtzman*, 403 U. S. 602, 618. Pp. 17-22.

MR. JUSTICE STEWART, joined by MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL, concluded in Part III that Act 195's textbook loan provisions, which are limited to textbooks acceptable for use in the public schools, are constitutional, since they "merely [make] available to all children the benefits of a general program to lend schools books, free of charge," and the "financial benefit is to parents and children, not to schools," *Board of Education v. Allen*, 392 U. S. 236, 243-244. Pp. 9-12.

MR. JUSTICE REHNQUIST, joined by MR. JUSTICE WHITE, concluded that the textbook loan program of Act 195 is constitutionally indistinguishable from the program upheld in *Board of Education v. Allen*, *supra*. P. 1.

STEWART, J., announced the judgment of the Court and delivered an opinion of the Court, in which BLACKMUN and POWELL, JJ., joined, and in all but Part III of which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring

Syllabus

in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment in part and dissenting in part. REHNQUIST, J., filed an opinion concurring in the judgment in part and dissenting in part, in which WHITE, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-1765

Sylvia Meek et al., Appellants, v. John C. Pittenger, Etc., et al.	}	On Appeal from the United States District Court for the Eastern District of Pennsylvania.
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[May 19, 1975]

MR. JUSTICE STEWART announced the judgment of the Court and delivered the opinion of the Court (Parts I, II, IV, and V), together with an opinion (Part III), in which MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL, joined.

This case requires us to determine once again whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools is constitutional under the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105, 108; *Cantwell v. Connecticut*, 310 U. S. 296, 303.

I

With the stated purpose of assuring that every school-child in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools,¹ the Pennsylvania General Assembly in 1972 added Acts 194 and 195, July 12, 1972, Pa. Stat. Tit. 24, § 9-972, to the Pennsylvania Public School Code of 1949, Pa. Stat. Tit. 24, §§ 1-101 to 27-2702.

¹ See Act 194, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a); Act 195, § 1 (a), Pa. Stat. Tit. 24, § 9-972 (a).

Act 194 authorizes the Commonwealth to provide "auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory attendance requirements.² "Auxiliary serv-

² Act 194 provides:

"(a) Legislative Finding; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof.

"(b) Definitions. The following terms, whenever used or referred to in this section, shall have the following meanings, except in those circumstances where the context clearly indicates otherwise:

"'Nonpublic school' means any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of this act and which meet the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 89-352).

"'Auxiliary services' means guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"(c) Provision of Services. Pursuant to rules and regulations established by the secretary, each intermediate unit shall provide auxiliary services to all children who are enrolled in grades kindergarten through twelve in nonpublic schools wherein the requirements of the compulsory attendance provisions of this act may be met and

ices" include counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, "and such other secular, neutral, non-ideological services as are of benefit to nonpublic schoolchildren and are presently or hereafter provided for public schoolchildren of the Commonwealth." Act 194 specifies that the teaching and services are to be provided in the nonpublic schools themselves by personnel drawn from the appropriate "intermediate unit," part of the public school system of the Commonwealth established to provide special services to local school districts. See Pa. Stat. Tit. 24, §§ 9-951 to 9-971.

Act 195 authorizes the State Secretary of Education, either directly or through the intermediate units, to lend textbooks without charge to children attending nonpublic elementary and secondary schools that meet the Commonwealth's compulsory attendance requirements.³ The

which are located within the area served by the intermediate unit, such auxiliary services to be provided in their respective schools. The secretary shall each year apportion to each intermediate unit an amount equal to the cost of providing such services but in no case shall the amount apportioned be in excess of thirty dollars (\$30) per pupil enrolled in nonpublic schools within the area served by the intermediate unit."

The Pennsylvania Public School Code of 1949 provides that the requirements of the compulsory attendance law may be met at a nonpublic school so long as "the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." Pa. Stat. Tit. 24, § 13-1327.

³ The sections of Act 195 relating to the loan of textbooks provide:

"(b) Definitions. . . . 'Textbooks' means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth.

"(c) Loan of Textbooks. The Secretary of Education directly, or

books that may be lent are limited to those "which are acceptable for use in any public, elementary, or secondary school of the Commonwealth."

Act 195 also authorizes the Secretary of Education, pursuant to requests from the appropriate nonpublic school officials, to lend directly to the nonpublic schools "instructional materials and equipment, useful to the education" of nonpublic schoolchildren.* "Instructional

through the intermediate units, shall have the power and duty to purchase textbooks and, upon individual request, to loan them to all children residing in the Commonwealth who are enrolled in grades kindergarten through twelve of a nonpublic school wherein the requirements of the compulsory attendance provisions of this act may be met. Such textbooks shall be loaned free to such children subject to such rules and regulations as may be prescribed by the Secretary of Education.

"(d) Purchase of Books. The Secretary shall not be required to purchase or otherwise acquire textbooks, pursuant to this section, the total cost of which, in any school year, shall exceed an amount equal to ten dollars (\$10) multiplied by the number of children residing in the Commonwealth who on the first day of October of such school year are enrolled in grades kindergarten through twelve of a nonpublic school within the Commonwealth in which the requirements of the compulsory attendance provisions of this act may be met."

* The sections of Act 195 relating to the direct loan of instructional material and equipment provide:

"(b) Definitions. . . . 'Instructional equipment' means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or teachers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"'Instructional materials' means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparen-

materials" are defined to include periodicals, photographs, maps, charts, sound recordings, films, "or any other printed and published materials of a similar nature." "Instructional equipment," as defined by the Act, includes projection equipment, recording equipment, and laboratory equipment.

On February 7, 1978, three individuals and four organizations⁵ filed a complaint in the District Court for the

cies, films, filmstrips, kinescopes, and video tapes, or any other printed and published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"(e) Purchase of Instructional Materials and Equipment. Pursuant to requests from the appropriate nonpublic school official on behalf of nonpublic school pupils, the Secretary of Education shall have the power and duty to purchase directly, or through the intermediate units, or otherwise acquire, and to loan to such nonpublic schools, instructional materials and equipment; useful to the education of such children, the total cost of which, in any school year, shall be an amount equal to but not more than twenty-five dollars (\$25) multiplied by the number of children residing in the Commonwealth who on the first day of October of such school year, are enrolled in grades kindergarten through twelve of a nonpublic school in which the requirements of the compulsory attendance provisions of this act may be met."

⁵ The individual plaintiffs are Sylvia Meek, Bertha G. Myers, and Charles A. Weatherley; all are resident taxpayers of the Commonwealth of Pennsylvania. The organizational plaintiffs are the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Pennsylvania Jewish Community Relations Council, and Americans United for Separation of Church and State; each group has members who are taxpayers of Pennsylvania. *Meek v. Pittenger*, 374 F. Supp. 639, 643. The District Court properly concluded that both the individual and the organizational plaintiffs had standing to bring this challenge to Acts 194 and 195. *Id.*, at 647; see *Flast v. Cohen*, 392 U. S. 83; *Sierra Club v. Morton*, 405 U. S. 727.